

**U.S. Department of Labor**

Office of Administrative Law Judges  
800 K Street, NW, Suite 400-N  
Washington, DC 20001-8002

(202) 693-7300  
(202) 693-7365 (FAX)



DATE ISSUED: Feb. 7, 2001

Case No. 1998-BLA-1368

In the Matter of

VIRGINIA DILLON, widow of  
HERSHEL DILLON,  
Claimant,

v.

DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS,  
Party-in-Interest

David O. McGovern, Esquire  
For the Claimant

Thomas A. Grooms, Esquire  
J. Phillip Giannikas, Esquire  
For the Director

Before: EDWARD TERHUNE MILLER  
Administrative Law Judge

**DECISION AND ORDER - REJECTION OF CLAIMS**

This proceeding arises from claims filed by Hershel Dillon, now deceased, and Virginia Dillon, his surviving spouse, for benefits under the Black Lung Benefits Act, 30 U.S.C. §§901, *et seq.*, as amended ("Act").<sup>1</sup> The pertinent implementing regulations appear at Parts 718 and 725 of Title 20

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<sup>1</sup>Claimant's request dated May 31, 2000, that an order of dismissal for failure to appear be vacated and that the case be decided based upon a review of documentation, was granted by order

of the Code of Federal Regulations.<sup>2</sup> Since the miner was last employed as a coal miner in West Virginia, the law of the U.S. Court of Appeals for the Fourth Circuit is controlling. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

Black lung benefits are awarded to coal miners who are totally disabled due to pneumoconiosis, commonly known as black lung, or to the survivors of coal miners whose death was due to pneumoconiosis within the meaning of the Act. Pneumoconiosis means a chronic dust disease of the lung and its sequelae, including respiratory or pulmonary impairments arising out of coal mine employment, and includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. §§718.201, 725.101(a)(25).

### Procedural History

#### Miner's Claim:

The miner, Hershel Dillon, filed his initial application for benefits under the Act on June 19, 1973 (DX 25-1). Following the passage of the Black Lung Benefits Reform Act of 1977, he elected to have his claim reviewed by the Social Security Administration (DX 26-1). On May 9, 1979, the Social Security Administration denied the claim (DX 25-8). Thereafter, the claim was reviewed by the Department of Labor's Deputy Commissioner, now known as the District Director. By letter dated September 12, 1980, the Deputy Commissioner denied the claim on the grounds that the miner had failed to establish any of the elements of entitlement (DX 26-14). Since the Claimant did not appeal or take any further action within one year, the denial became final.

The miner filed the current duplicate claim on June 4, 1993 (DX 1). Following a formal hearing on March 14, 1995, Administrative Law Judge Sheldon R. Lipson issued a Decision and Order Denying Benefits dated August 27, 1996 (DX 30, 31). On appeal, the Benefits Review Board issued a Decision and Order dated June 26, 1997, affirming (DX 38). On November 17, 1996, the miner died. Although Virginia Dillon, the miner's widow and Claimant, did not specifically appeal or request modification of the miner's claim, she filed a survivor's claim, as well as various other documents, on November 19, 1997 (DX 39). On August 7, 1998, the District Director issued a "Proposed Decision and Order Memorandum of Conference," stating in pertinent part, that "Mrs.

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dated June 8, 2000. Director's Brief was filed under cover letter, dated July 31, 2000.

<sup>2</sup>Amendments to Parts 718 and 725 of the regulations are set forth in 65 Federal Register 80,045 (Dec. 20, 2000). The amended Part 718 regulations became effective on January 19, 2001, and apply to both pending and newly filed cases. The new Part 725 regulations also became effective on January 19, 2001, but certain provisions of the Part 725 regulations only apply to claims filed on or after January 19, 2001. References herein to regulatory sections which were applicable prior to the December 20, 2000, amendments are not changed. All references are to Title 20 CFR unless otherwise indicated.

Dillon's application and the evidence submitted in the development of her claim is considered a request for modification of the denial of the miner's claim." The District Director concluded that the autopsy finding by Dr. Harlan established the presence of pneumoconiosis under §718.202(a)(2), and that this represented a modification under §725.310 and a material change in conditions under §725.309. Nevertheless, the District Director, again, denied the miner's claim because the evidence failed to establish total disability due to pneumoconiosis (DX 62).<sup>3</sup>

#### Widow's Survivor's Claim:

On November 19, 1997, Claimant filed an application for survivor's benefits which was denied by the District Director's office on March 19, 1998 (DX 1, 54). On or about April 27, 1998, Claimant filed a timely request for a formal hearing (DX 56). The District Director's Proposed Decision and Order Memorandum of Conference dated August 7, 1998, found in pertinent part, that, although there is autopsy evidence of simple pneumoconiosis, Claimant failed to establish that the miner's death was due to pneumoconiosis under the applicable regulatory criteria set forth in §718.205(c). (DX 62).

By letters dated April 21, 1998 (DX 56) and August 25, 1998 (DX 63), the Claimant filed timely requests for a formal hearing. On September 28, 1998, the claims of the miner and surviving spouse were forwarded to the Office of Administrative Law Judges for adjudication (DX 64,65). Following various procedural delays, and pursuant to the Claimant's request, this decision is based upon the written record.

#### Issues

The issues in the miner's case are:

1. Whether the miner was totally disabled; and,
2. Whether the miner's disability was due to pneumoconiosis (DX 64).

The issue in the widow's case is:

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<sup>3</sup>The District Director combined the "total disability" and "causation" issues, stating that the medical evidence submitted since the administrative law judge's decision still does not "establish total disability from a respiratory condition caused by coal dust exposure....The weight of evidence shows that claimant was not totally disabled due to pneumoconiosis as a result of coal mine employment, therefore claimant has not met the burden of establishing total disability." (DX 62, p. 7).

Whether the miner's death was due to pneumoconiosis. (DX 65).<sup>4</sup>

The Director has conceded, and the parties have stipulated to, the following: the timeliness of the miner's and widow's claims; the widow's status as a surviving spouse and the sole dependent of the miner; seven years of coal mine employment; the existence of pneumoconiosis; the causal relationship between the miner's simple pneumoconiosis and his coal mine employment; that the miner completed all of his coal mine employment before January 1, 1970, thereby placing responsibility for payment of benefits, if any, upon the Black Lung Disability Trust Fund; and, that the requirements for modification under §725.310 and a material change of conditions under §725.309 have been established. (DX 62).

#### Findings of Fact, Conclusions of Law, and Discussion

The record consists of Director's Exhibits 1 through 65 (DX 1-65) and Claimant's Exhibit 1 (CX 1). The latter exhibit is a letter by Dr. Barnett, dated March 9, 2000, which was described as "Attachment B" to the Claimant's May 31, 2000, motion for reinstatement and a decision on the written record.<sup>5</sup> Both the Director's Pre-Hearing Report and Director's Briefing on the Record have been considered. The findings and conclusions that follow are based upon analysis of the entire record in light of the applicable statutory provisions, regulations, and pertinent case law.

In his Decision and Order Denying Benefits dated August 27, 1996, Judge Lipson found that the miner ended his 7 years of coal mine employment in 1958 (DX 31). Thereafter, he worked in various non-coal mine jobs until 1983. In contrast to the miner's relatively minimal coal mine

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<sup>4</sup>Under the heading "Other Issues" on the controversion sheet dated September 28, 1998, is listed: "That the survivor can be found to be entitled without establishing that the miner's death was due to pneumoconiosis in this case where the miner filed after January 1, 1982, per 20 CFR 725.201(a)(4)(ii)." Under the provisions of §718.1, however, the Claimant must establish death due to pneumoconiosis to be entitled to benefits, unless the miner was found entitled to benefits as a result of a claim filed prior to January 1, 1982, or the survivor's entitlement was established pursuant to §718.306 on a claim filed before June 30, 1982. §718.1 In the present case, the miner's initial claim was finally denied and administratively closed on September 12, 1980 (DX 26-14). The miner's claim currently under consideration was filed on June 4, 1993 (DX 1). Therefore, in order for the Claimant to be eligible for survivor's benefits, the evidence must establish death due to pneumoconiosis.

<sup>5</sup>In the "Order Vacating Dismissal and Granting Request for Decision on the Written Record," dated June 8, 2000, the specified evidence was received into evidence subject to the Director's objection within ten days. The Director was allowed thirty days within which to respond. No objection or response was filed.

employment history, Judge Lipson cited medical evidence which established that, as of June 19, 1980, the miner had an ongoing cigarette smoking history of one half pack per day for approximately 42 years (DX 1, 2; DX 26-9; DX 31, p. 3). At the formal hearing before Judge Lipson on March 14, 1995, the miner testified that he had a long history of severe breathing problems, and that he used a breathing machine and oxygen at home (DX 30, pp. 20-23). The miner's last usual coal mine job was as a timberman, heavy manual labor which entailed standing, crawling, and lifting in dusty conditions (DX 2, 5; DX 25-1; DX 30, pp. 17-20).

Judge Lipson weighed the x-ray interpretations then of record and determined that the miner had failed to establish pneumoconiosis under §718.202(a)(1). At that time the record did not contain any biopsy or autopsy evidence. Therefore, pneumoconiosis could not be established under §718.202(a)(2). The presumptions set forth in §§718.304, 718.305, and 718.306 were inapplicable, which precluded a finding of pneumoconiosis under §718.202(a)(3). Judge Lipson found that the CT scan produced evidence of "chronic obstructive pulmonary disease with bullous emphysema" which did not establish pneumoconiosis. Judge Lipson declared that the "reports" of Drs. Turitto and Barnett were "nothing more than cursory, poorly reasoned and poorly documented 'To Whom It May Concern' statements," which were entitled to no weight. Accordingly, Judge Lipson found that, based upon the then existing evidence, the miner had failed to establish the existence of pneumoconiosis.

Regarding total disability, Judge Lipson found that the pulmonary function and arterial blood gas test results were not qualifying. There was no evidence of cor pulmonale with right-sided congestive heart failure. Judge Lipson concluded that the miner had failed to establish total disability on the basis of the medical opinion evidence. Therefore, based upon the then available evidence, Judge Lipson found that the miner had failed to establish total disability under §718.204(c)(1) through(4).<sup>6</sup> Judge Lipson also found no material change in conditions from the final denial of the miner's prior claim. Finally, Judge Lipson concluded that, even if a material change in conditions had been established, and the entire record were considered, it would not establish entitlement under the Act. In conclusion, Judge Lipson stated:

The hospital records indicate that, in 1993, the Claimant was diagnosed as suffering from the following: malignant lymphoma, retroperitoneal, large cell type; chronic renal failure; hypercalcemia; chronic obstructive pulmonary disease; chronic anxiety; hypertension; and right lower lobe pneumonia (Citrobacter). Although one might infer that the Claimant would be totally disabled from performing his usual coal mine work or comparable gainful employment because of these multiple medical problems, there is no credible medical opinion which actually makes such a finding. More significantly, even assuming I would find that the Claimant is totally disabled, there is no credible medical evidence which establishes any relationship between such disability and pneumoconiosis or Claimant's limited coal mine employment. For the

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<sup>6</sup>The total disability provisions, formerly §718.204(c)(1)-(4), have been recodified as §718.204(b)(2)(i)-(iv) in amended Part 718.

reasons stated above, I accord no weight to the "To Whom It May Concern" statements by Drs. Turitto and Barnett.

Finally, assuming *arguendo* that the Claimant had established a material change in condition and I considered all of the evidence, both old and new, I would still find that the Claimant is not entitled to benefits. Based upon a review of the entire record...(citations omitted)...I find that the overwhelming preponderance of the x-ray evidence is negative for pneumoconiosis. The CT scan of the chest and credible medical opinion evidence also fail to establish pneumoconiosis. The preponderance of the pulmonary function and arterial blood gas evidence are nonqualifying. Moreover, the most credible medical opinion evidence (*i.e.*, Dr. Epstein's), which is most consistent with the clinical evidence, Claimant's minimal coal mine employment history, and extensive cigarette smoking history, establishes that the Claimant's respiratory problems are unrelated to pneumoconiosis or coal mine employment.

In summary, I find that the Claimant has failed to establish a material change in condition. Further, even when one considers all the medical evidence, including that which was submitted in conjunction with the earlier claim, the Claimant has still failed to establish that he has pneumoconiosis or is totally disabled thereby. Therefore, the Claimant is not entitled to benefits under the Act.

(DX 31, p. 6). On appeal, the Benefits Review Board affirmed Judge Lipson's Decision and Order denying benefits (DX 38).

Based upon an independent review of the *then* existing medical evidence, this tribunal finds no mistake in any determination of fact in Judge Lipson's decision. However, as discussed herein, the more recent medical evidence, in particular the autopsy report, does establish that the miner's condition had changed, and that at the time of his death he had simple pneumoconiosis. Furthermore, as previously stated, the Director concedes the presence of pneumoconiosis arising from the miner's seven years of coal mine employment. The Director's stipulation also establishes modification under §725.310 and a material change in conditions under §725.309. Accordingly, all of the relevant evidence, old and new, must be considered, with respect to both the widow's claim and the miner's claim.

#### Medical Evidence

The medical evidence which was considered by Judge Lipson has been independently reviewed as required. This evidence includes the overwhelmingly negative x-ray evidence; nonqualifying pulmonary function studies;<sup>7</sup> the clear preponderance of the nonqualifying arterial blood

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<sup>7</sup>Pulmonary function studies were performed by the miner on September 18, 1973 (DX 25-5), June 18, 1980 (DX 26-8), and April 1, 1993 (DX 10). None of the tests, before or after the administration of bronchodilators, were qualifying under the applicable regulatory criteria set

gas studies;<sup>8</sup> CT scans, miscellaneous treatment records; and the medical opinions of Drs. Epstein, Barnett, and Turitto.<sup>9</sup> This previously submitted evidence failed to establish the presence of pneumoconiosis or total disability arising therefrom. Judge Lipson's finding that the virtually identical, one-paragraph, "To Whom It May Concern" statements by Drs. Turitto and Barnett dated May 6, 1993, and May 13, 1993, respectively, are cursory, poorly reasoned and poorly documented is incontrovertible. (DX 8, 9,49). In their statements, Drs. Turitto and Barnett cite an unspecified mining history. It appears from other records that Dr. Barnett may not have known the miner's actual coal mine employment history. For example, on January 24, 1994, Dr. Barnett reported the following: "SOCIAL HISTORY: The patient is a retired coal miner (he retired on the basis of his liver and lungs approximately 10 years ago). The patient is married and lives with his wife." (DX 46). This note suggests not only that Dr. Barnett relied upon a somewhat inflated coal mine employment history of ten years, instead of seven, but that he may have thought that the miner retired from mining in 1984 rather than 1958.<sup>10</sup> Moreover, the statements of Drs. Barnett and Turitto do not address the miner's extensive cigarette smoking history of a half a pack per day for approximately forty-two years, as reported by Dr. Epstein in 1980 (DX 26-19). Finally, they fail to cite any objective clinical test results to support their conclusions.

The newly amended provisions of §718.104(d), attribute controlling weight to the opinions of treating physicians in appropriate circumstances. The record reflects that Drs. Turitto and Barnett treated the miner, and that Dr. Barnett, in particular, treated the miner for several years regarding his respiratory or pulmonary conditions. Having considered the nature and duration of their relationship, as well as the apparent frequency and extent of treatment, this tribunal nevertheless finds that the stated opinions of those doctors are unpersuasive and should be accorded very little weight, if any, because the stated opinions of Drs. Turitto and Barnett are neither reasoned or documented, and are inconsistent with the evidentiary record as a whole. §718.104(d)(1)-(5).

The so called "new" medical evidence which has been submitted includes multiple interpretations of chest x-rays which pre-date Judge Lipson's decision, various treatment records

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forth in Part 718, Appendix B.

<sup>8</sup>Arterial blood gas studies were administered to the miner on June 19, 1980 (resting and exercise)(DX 21), April 1, 1993 (resting)(DX 10), and June 1, 1993(resting) (DX 10). Of the foregoing, only the resting June 19, 1980, blood gas test is qualifying under the standards stated in Part 718, Appendix C.

<sup>9</sup>Dr. Epstein did not attribute the miner's COPD to the miner's coal mine employment (DX 26-9), while Drs. Turitto and Barnett concluded that the miner's coal mine employment contributed to emphysema, and possibly his lymphoma (DX 8, 9, 49).

<sup>10</sup> After leaving the mines in 1958, the miner worked briefly in house construction in 1959 and 1960. Thereafter, he worked in the food distribution industry for approximately twenty-three years before retiring in 1983 (DX 2).

most of which also pre-date the prior decision, Dr. Harvey's consultant's report, the miner's death certificate, a supplemental note by Dr. Shepherd, Dr. Harlan's autopsy report, Dr. Crouch's pathology report, and a supplemental letter by Dr. Barnett.

On February 23, 1998, Dr. E. Nicholas Sargent, a B-reader and Board-certified radiologist, interpreted chest x-rays dated August 1, 1993 (DX 53), November 29, 1993 (DX 52), April 23, 1994 (DX 51), and January 15, 1995 (DX 50). Dr. Sargent found that all of these films were negative for pneumoconiosis, but suggested possible emphysema. Dr. Sargent also commented: "Smoking history?" and noted osteoarthritis of spin, and on his reading of the January 15, 1995, x-ray, Dr. Sargent noted: "? C.O.P.D. ? Correlate clinically" (DX 50). Although his x-ray interpretations do not support a finding of pneumoconiosis under §718.202(a)(1), they are less probative than the autopsy findings of pneumoconiosis. Moreover, while x-ray evidence is diagnostic of disease, it does not measure functional impairment. Therefore, it is not probative of total disability.

The record also includes the treatment records of Whitwell Medical Center (DX 10), Dr. Barnett (DX 45), and Dr. Krueger (DX 47). Those records establish that the miner suffered from multiple conditions, including lymphoma, chronic obstructive pulmonary disease, COPD with bullous emphysema, and extensive aortic calcification. There were few references to black lung disease, except occasionally by history. Although it could be inferred that the miner was totally disabled prior to his death, there is no specific objective clinical finding by a qualified physician that the miner was totally disabled by a respiratory or pulmonary impairment.

Dr. Sylvia Krueger treated the miner in the years immediately preceding his death. Her records reveal that she treated the miner primarily for recurrent lymphoma (DX 47). Dr. Krueger initially reported some success in treating the disease in progress notes dated March 20, 1995, June 29, 1995, November 27, 1995, and February 28, 1996. However, on September 16, 1996, Dr. Krueger reported a "history of lymphoma with recurrent mass in the jaw." On October 1, 1996, Dr. Krueger recorded a decision with the miner and his family not to continue chemotherapy and an assessment of other treatment in light of the overall poor prognosis of the current intermediate grade lymphoma. (DX 47).

Dr. Krueger referred the miner to Dr. Hathaway K. Harvey, a surgeon at an otologic center, regarding a mass in the right ear. In her report dated October 3, 1996, Dr. Harvey noted the miner's history of abdominal lymphoma, recent weight loss, enlargement of the spleen, recently apparent mass in his right neck behind the ear, limited mobility, and list of current medications. Responding to a primary parotid neoplasm, she recommended a biopsy which was performed on October 3, 1996, and preliminarily diagnosed by Dr. Sanford C. Sharp as highly suggestive of malignant lymphoma, in light of a prior history of malignant lymphoma.<sup>11</sup> In a subsequent notation dated October 22, 1996, less than a month prior to the miner's death, Dr. Krueger noted a family consensus favoring palliative treatment only. (DX 47).

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<sup>11</sup>The final report of the needle biopsy does not appear in the record.

The October 1, 1996, progress note entered approximately six weeks prior to the miner's death, recorded that the miner's "chest is normal to auscultation. Lungs are clear. There are no rales or rhonchi. There is no costovertebral angle tenderness to percussion or palpation. There is no accessory ventilatory muscle usage." (DX 47). Significantly, the assessment made no reference to pneumoconiosis or pulmonary or respiratory impairment.

The miner's death certificate, signed by Dr. Karen Rhea Sheppard, D.O., records that the miner died on November 17, 1996, at age 74. The doctor recorded that the immediate cause of death was cardio-pulmonary arrest due to COPD. No other significant conditions contributing to the miner's death were listed. The decedent's usual occupation was listed as "miner" and the kind of business/industry was reported as "coal." (DX 43, Items 12a and 12b). However, the miner only worked in the mines for 7 years ending in 1958, and subsequently worked in the food industry from 1960 to 1983 (DX 2). Furthermore, Dr. Sheppard reported that, even though an autopsy was performed, the findings were not available prior to her completion of the cause of death portion of the death certificate (DX 43, Items 29a and 29b). In a "To Whom It May Concern" note dated February 14, 1998, Dr. Sheppard recorded a disclaimer that "Hershel A. Dillon was seen at the time of his death, in my capacity as medical examiner. I have no files or information on him. I assisted his wife in her request for autopsy. However, I do not believe there was one due to the wife having to pay for it." (DX 48).

Dr. Charles W. Harlan, who is board-certified in anatomic and clinical pathology and forensic pathology, conducted an autopsy of the miner on November 17, 1996. The autopsy report includes a Gross Description, Microscopic Summary, Final Anatomic Diagnosis, and Medicolegal Opinion (DX 44, 44a). The autopsy report lists, in relevant part, diagnoses of poorly differentiated carcinoma of pancreas (head), with metastases to the periaortic lymph nodes, spleen, and with right pleural effusion, and "chronic obstructive pulmonary disease (black lung disease), with marked pulmonary emphysema (panlobular), marked pulmonary anthracosis, and marked pulmonary fibrosis. The secondary diagnosis noted marked generalized arteriosclerosis, cirrhosis of liver, and marked benign hyperplasia. (DX 44) In his "Medicolegal Opinion," Dr. Harlan stated, "This 70 year old white male died as the result of poorly differentiated carcinoma of the head of the pancreas, with metastases to regional lymph nodes and spleen. Also present at autopsy are chronic obstructive pulmonary disease ("black lung disease"), arteriosclerosis ("hardening of the arteries"), and cirrhosis of the liver." (DX 44).

Dr. Erika C. Crouch, who is board-certified in anatomic pathology, provided a Pulmonary Pathology Consultation dated May 15, 1998, in which she reviewed the autopsy slides together with the corresponding autopsy report and six labeled photographs of lung (DX 58 59). Dr. Crouch's microscopic findings related to the lung slides and five sections of lung, disclosed "emphysema with a predominant panacinar pattern and areas of centriacinar emphysema and non-specific interstitial fibrosis." She recorded that "[t]he lung tissue contains minimal amounts of dust particles consistent with coal dust and black rounded particles consistent with carbonaceous products derived from cigarette smoking, [but] [n]o coal dust macules, micronodules, nodules or areas of focal emphysema...and no evidence of massive fibrosis and no silicotic nodules or areas of complicated

silicosis....” She diagnosed emphysema, predominantly panacinar and minimal coal dust deposition, but commented, “None of the characteristic lesions of coal miner’s pneumoconiosis are identified in the sections of the lung consistent with the gross description in the autopsy report. Thus, occupational coal dust exposure could not have caused any functional impairment and could not have contributed to or otherwise hastened this patient’s death from complications of disseminated malignancy.” (DX 58).

Dr. Barnett issued a supplemental “report” dated March 9, 2000, to the effect that, “Mr. Dillon’s records are in storage but from hospital, death certificate and my own recollections, his lymphoma was not the main cause of death. It was not aggressive and had responded to treatment. However, his COPD/black lung was progressive. It was listed on the death certificate as cause of death and I believe the primary cause of Mr. Dillon’s death was COPD/black lung.” (CX 1).

#### Applicable Regulations

Since the current miner’s claim and the widow’s claim were both filed after March 31, 1980, this claim is considered under Part 718, effective on January 19, 2001. §718.2

#### Discussion and Analysis

Since the Director concedes the presence of pneumoconiosis arising from the miner’s seven years of coal mine employment, and since those elements were previously adjudicated against the miner, a material change in conditions, and change of conditions as grounds for modification, have been established pursuant to §725.309 and §725.310, respectively. Accordingly, the merits of the miner’s claim depend on whether total disability and its cause by pneumoconiosis have been proved, and the merits of the widow’s survivor’s claim depend on whether the miner’s death was caused by pneumoconiosis.

#### The Miner’s Claim

Since Claimant has not established complicated pneumoconiosis, she is not entitled to invoke the irrebuttable presumption of total disability due to pneumoconiosis pursuant to §718.304 and §718.204(b)(1). With respect to a living miner’s claim, the amended §718.204(b) provides that the a miner is considered totally disabled if he has a pulmonary or respiratory impairment which, standing alone, prevents or prevented him from performing his usual coal mine work or comparable gainful work. The medical criteria for determining whether a miner is totally disabled are (1) pulmonary function tests qualifying under applicable regulatory standards; (2) arterial blood gas tests qualifying under applicable regulatory standards; (3) proof of pneumoconiosis and cor pulmonale with right sided congestive heart failure; or (4) proof of a disabling respiratory or pulmonary condition on the basis of the reasoned medical opinion of a physician relying upon medically acceptable clinical and laboratory diagnostic techniques. If there is contrary evidence in the record, all the evidence must be weighed as a whole in determining whether there is proof by a preponderance of the evidence that the miner is totally disabled due to pneumoconiosis. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-

95 (1986). None of the pulmonary function studies are qualifying, and so total disability has not been established pursuant to §718.204(b)(2)(i). (DX 25-5, DX 26-8, DX 10).

The preponderance of the arterial blood gas evidence is nonqualifying. Among the various resting and exercise blood gas tests conducted in 1980 and 1993, only the resting June 19, 1980 blood gas test is qualifying (DX 21,10). Accordingly, the Claimant has not established total disability under §718.204(b)(2)(ii). Section §718.204(b)(2)(iii) is inapplicable because there is no evidence of cor pulmonale or right-sided congestive heart failure.

Under §718.204(b)(2)(iv), total disability may be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevented him from engaging in his usual coal mine work or comparable and gainful work. The 1980 report of Dr. Epstein does not address total disability, and states that the miner's cardiopulmonary conditions were not related to coal mine employment. The 1993 "reports" of Drs. Barnett and Turitto concluded that the miner was "most definitely a candidate for the Black Lung Disease Program." (DX 8,9). However, even assuming that these opinions constituted a finding of total disability, they are poorly reasoned, undocumented, and, therefore, accorded little if any weight. The miner's treatment records show that the miner suffered from numerous health problems, including chronic obstructive pulmonary disease, bullous emphysema, aortic atherosclerosis, and lymphoma (DX 10,45,47). However, no reasoned and documented opinions establish that the miner's respiratory or pulmonary conditions were totally disabling.

The death certificate lists causes of death, but does not address whether the miner was totally disabled prior to death (DX 43). Moreover, Dr. Sheppard acknowledged that there was little basis for her conclusions recorded in the death certificate (DX 48). Dr. Harlan's autopsy report provides a better reasoned analysis of the cause of death, but also does not address total disability (DX 44). Dr. Crouch's report dated May 15, 1998, does not specifically address total disability, although Dr. Crouch opined that the pulmonary pathology showed that occupational coal dust exposure did not cause any functional impairment (DX 58). Finally, Dr. Barnett's poorly reasoned and undocumented supplemental report dated March 9, 2000, only addresses whether death was due to pneumoconiosis, and not total disability prior to death, and so has little, if any, probative value in that regard (CX 1).

In summary, although the record establishes that the miner was treated for respiratory problems, there is no reasoned and documented medical opinion which establishes that the miner suffered from a totally disabling respiratory or pulmonary impairment prior to his death. Therefore, total disability has not been established under §718.204(b)(2)(iv), or by any other means.

Assuming *arguendo* that Claimant had established the presence of a totally disabling respiratory or pulmonary impairment, the miner would still not have been eligible for benefits because the record does not contain any reasoned and documented medical opinion which establishes that the resulting total disability was due to pneumoconiosis as defined in amended §718.204(c)(1). That section provides that pneumoconiosis must have been a substantially contributing cause of his totally

disabling respiratory or pulmonary impairment. Under the regulation such an effect is proved by demonstrating that the pneumoconiosis had a materially adverse effect on the the miner's respiratory or pulmonary condition or materially worsened a totally disabling respiratory or pulmonary impairment unrelated to coal mine employment. Since there is a failure of such proof, the miner's claim must be denied.

### Widow's Claim

#### Death due to Pneumoconiosis

Since the widow's survivor's claim was filed after January 1, 1982, whether the miner's death was due to pneumoconiosis is governed by §718.205(c), as amended. That section provides in pertinent part that death will be considered to be due to pneumoconiosis if competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, or the miner's death was caused by complications of pneumoconiosis, or if the presumption set forth at §718.304 relating to complicated pneumoconiosis is applicable. If the principal cause of death was a medical condition not related to pneumoconiosis, the evidence must establish that pneumoconiosis was a substantially contributing cause of death. Pneumoconiosis is deemed a "substantially contributing cause" of a miner's death if it hastens the miner's death. §718.205(c).

The medical evidence relevant to whether death was due to pneumoconiosis includes Dr. Krueger's treatment records for the period shortly before the miner's death (DX 47), the death certificate signed by Dr. Shepherd, as medical examiner (DX 43,48), Dr. Harlan's autopsy report (DX 44), Dr. Crouch's pulmonary pathology report (DX 58), and Dr. Barnett's supplemental report (CX 1). Because Dr. Krueger's initial success in treating the miner's recurrent lymphoma gave way when the miner's lymphoma became progressive and malignant and she stopped further aggressive treatment, and because, approximately six weeks prior to his death, Dr. Krueger reported a "normal" chest on auscultation and "clear" lungs (DX 47), her progress notes are not proof of death due to pneumoconiosis.

Though Dr. Shepherd listed cardio-pulmonary arrest due to COPD as the immediate cause of the miner's death on the death certificate, the term "COPD" encompasses various respiratory and pulmonary diseases, including pneumoconiosis. In fact, Dr. Harlan included a diagnosis of "[c]hronic obstructive pulmonary disease (black lung disease)" on the autopsy report (DX 43, 44). Therefore, although the death certificate, if credited, might support a finding of death due to pneumoconiosis, Dr. Shepherd impeached her own findings on the death certificate by stating in the supplemental letter dated February 14, 1998, that she had only seen the miner at the time of his death in her capacity as medical examiner, and that her conclusions were rendered without the benefits of any files, information, or autopsy findings (DX 48). Thus, lacking a reasoned basis and supportive documentation, the death certificate is accorded little if any probative weight..

Dr. Harlan's autopsy report is the basis upon which the presence of pneumoconiosis has been

established (DX 44). Although Dr. Harlan listed black lung disease, arteriosclerosis, and cirrhosis among various pathologic diagnoses, he opined that the miner “Died as a result of poorly differentiated carcinoma of the pancreas, with metastases to regional lymph nodes and spleen.” (DX 44). Accordingly, that autopsy report does not establish that pneumoconiosis caused, substantially contributed to, or hastened the miner’s death. Dr. Harlan’s opinion that the miner died of metastatic carcinoma is consistent with the treatment records of Dr. Krueger.

Dr. Crouch’s pathology report is less complete than the autopsy report, because it appears to focus solely on the autopsy slides of the lung. It does not support a finding of death due to pneumoconiosis, because Dr. Crouch found that occupational coal dust exposure “could not have contributed to or otherwise hastened this patient’s death from complications of disseminated malignancy.” (DX 58).

Dr. Barnett, a board-certified family practitioner who had treated the miner for various medical conditions including respiratory problems, issued a one-paragraph report dated March 9, 2000, almost three and one half years after the miner’s death, which acknowledged that the miner’s records were in storage, but cited unspecified hospital records, the death certificate, and his own recollection in concluding that “lymphoma was not the main cause of death [because] [i]t was not aggressive and had responded to treatment.” On the other hand, Dr. Barnett described the miner’s COPD/black lung as “progressive.” Citing the death certificate Dr. Barnett declared, “I believe the primary cause of Mr. Dillon’s death was COPD/black lung.” (CX 1). Though Dr. Barnett’s opinion might have been accorded controlling weight in light of his status and relationship with the miner as treating physician as provided in amended §718.104(d), that opinion, as set forth in the supplemental report, is also cursory, poorly reasoned, and virtually undocumented. Since Dr. Barnett did not cite any specific, credible clinical evidence to support his conclusions, and since his conclusion that the miner’s lymphoma was not aggressive and was not the main cause of death is wholly inconsistent with the conclusions of Dr. Krueger reflected in her treatment records, as well as the autopsy findings of Dr. Harlan, Dr. Barnett’s supplemental report is simply not credible or persuasive, regardless of his alleged status as a treating physician.

In view of the foregoing, Claimant has failed to meet her burden of establishing that the miner’s death was due to pneumoconiosis pursuant to §§718.205(c)(1) through (4), or by any other means. Consequently, the widow’s survivor’s claim must also be denied.

#### Attorney’s Fee

The award of an attorney’s fee is permitted only in cases in which a claimant is found to be entitled to benefits under the Act. Since benefits are not awarded with respect to either of these claims, the Act prohibits the charging of any fee for representation services rendered in pursuit of either the miner’s or the survivor’s claims.

#### ORDER

The claims of Hershel Dillon, the deceased miner, and Virginia Dillon, his surviving spouse, for black lung benefits under the Act are denied.

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EDWARD TERHUNE MILLER  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** Pursuant to 20 C.F.R. 725.481, any party dissatisfied with this Order may appeal to the Benefits Review Board within 30 days from the date of this Decision and Order, by filing a notice of appeal with the ***Benefits Review Board at P.O. Box 37601, Washington, D.C. 22013-7601.*** A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Frances Perkins Building, Room N-2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.